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June 14, 2004

**BY HAND**

Marlene K. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street SW  
Washington, DC 20554

**RECEIVED**

JUN 14 2004

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: WT Docket No. 02-55, 800 MHz Proceeding

Dear Ms. Dortch:

Mobile Relay Associates ("MRA"), a commenter in the captioned proceeding, desires to supplement the record with this written *ex parte* presentation. MRA, in its earlier filings herein, has argued that the Nextel plan for rebanding in 800 MHz is unconstitutional, violating both the Fourth Amendment proscription against unreasonable seizures of private property and the Fifth Amendment proscription against "takings." *See, e.g.,* August 7, 2002 *Reply Comments*, at p.7; February 10, 2003 *Comments on Supplemental Comments of the "Consensus Parties"*, at pp.9-10; and July 15, 2003 *Supplemental Comments of Mobile Relay Associates and Preferred Communication Systems, Inc., seriatim.*

The facts are rather simple. The incumbent 800 MHz site-based licensees hold licenses with a recognizable and very significant fair market value. The Nextel plan proposes to take away the current spectrum held by current 800 MHz site-based licensees (including itself) and deliver that spectrum to public safety, while providing Nextel (but not other incumbents) with replacement spectrum of equal or greater fair market value. Other incumbents would receive replacement spectrum with virtually no fair market value.

Under federal law, a Commission license is deemed property in the analogous context of bankruptcy. Specifically, under 11 U.S.C. § 525, the Commission is prohibited from revoking a license on the ground that a debtor/licensee failed to make timely purchase payments to the Commission. *FCC v. Nextwave Personal Comm.*, 537 U.S. 293 (2003). Thus, the Bankruptcy statute blocks the Commission from attempting to use "self-help" to regain pledged property, and places the Commission in the same position as other secured creditors with respect to such property, all

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of which could only be the case if Congress deemed such a license to be "property." Indeed, if spectrum is not "property" in this context, then Congress would not have been able to enact an auction regime, as it has done. And such property cannot be confiscated, except via some procedure akin to (and with similar protections as) eminent domain.

That some (not all) members of the public safety community have decided to utilize the once-in-a-lifetime opportunity presented by the war on terrorism to confiscate privately-held 800 MHz spectrum that would otherwise have to be acquired via private purchase or eminent domain, and have therefore aligned themselves with Nextel, is not evidence of where the public interest lies. Under the U.S. Constitution, if the war on terrorism has created such an enormous need for public safety to hold more 800 MHz spectrum, then those whose property is being taken are entitled to compensation.<sup>1</sup> If, conversely, the "emergency" is not so dire as to justify the expenditure (direct or indirect)<sup>2</sup> of public funds for compensation, then the public interest is not served by allowing confiscation of private property.

Public safety entities historically have had limited regard for the Bill of Rights; to them it is an obstacle to job performance. That is why our system of government has legislative and judicial branches to hold the executive branch in check. It is the duty of this Commission to resist falling victim to hysteria, and to stand up to those within the public safety community that put their short-term desire for new, free 800 MHz spectrum ahead of the larger long-term public interest in protecting the rights of the individual in a free society.

The Nextel plan has been fatally flawed from a constitutional standpoint since it was first proposed, and it remains constitutionally flawed even with its recent modifications.

We again urge the Commission to craft a solution which, if it forcibly takes away privately-held spectrum, replaces the confiscated spectrum with new spectrum having an equal fair market value.

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<sup>1</sup>This assumes, of course, that only 800 MHz spectrum would suffice for the needs of public safety, a rather dubious assumption.

<sup>2</sup>If the government eschews an auction of otherwise auctionable spectrum and instead gives that spectrum to Nextel while directing Nextel to compensate the other adversely-affected incumbent licensees, that is an indirect means of the government paying compensation. However, if the mechanism is designed to provide only a tiny fraction of necessary compensation to non-Nextel licensees, then it remains unconstitutional.

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Sincerely,

A handwritten signature in black ink, appearing to read 'D. Kaufman', with a long horizontal flourish extending to the right.

David J. Kaufman,  
Counsel to Mobile Relay Associates

cc: Mobile Relay Associates  
Hon. Michael K. Powell  
Hon. Kathleen Q. Abernathy  
Hon. Kevin J. Martin  
Hon. Michael J. Copps  
Hon. Jonathan S. Adelstein  
Sheryl Wilkerson, Esq.  
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